



CLEAN WATER ACT – DEFINITION OF “WATERS OF THE U.S.”

Issue:

The Clean Water Act (CWA) provides the U.S. Army Corps of Engineers and Environmental Protection Agency (the agencies) with the authority to federally regulate “navigable waters,” defined in the Act as the “waters of the United States (WOTUS), including the territorial seas.” All other waters fall under the protection of state and local governments.

The extent of federal CWA jurisdiction has significant implications for farmers, ranchers, landowners, businesses, and state and local governments. Extensive federal permitting requirements apply to all WOTUS and can lead to increased costs and delays for projects ranging from infrastructure development and stormwater management to homebuilding and crop planting. Failure to obtain necessary CWA permits can result in fines of over \$53,000 per day and criminal penalties.

For decades, confusion surrounding the CWA’s reach has led to widespread regulatory uncertainty, costly litigation, and stifled economic growth. Absent clear regulatory lines between state and federal waters, regulators make case-by-case determinations, providing little predictability for the regulated community. Stakeholders have therefore long sought a rulemaking that draws such clear lines.

Background:

NAVIGABLE WATERS

The 2015 rule attempted to clarify the distinction between state and federal waterways. However, the rule failed to achieve its stated goal of providing regulatory certainty and suffered from numerous flaws, leading thirty-one states, agricultural interests, business groups, and even environmental organizations to challenge it in court. For example, two Supreme Court decisions have previously affirmed that the term “navigable waters” under the Clean Water Act does not include *all* waters. Yet, the 2015 WOTUS regulation ignores those limits by allowing EPA and the Corps to regulate activities on dry land and over remote, isolated wetlands under the Clean Water Act. Such an over-reach goes well beyond anything contemplated by the authors of the 1972 law.

Legislative/Regulatory Status:

On June 29, 2018, the agencies published a revised proposal to repeal the 2015 rule in its entirety. Under this proposal, the agencies would recodify the pre-2015 regulations until the agencies finalize a new definition of WOTUS.

On December 11, 2018, the agencies proposed a **new Clean Water rule** which, if finalized, would put in place a WOTUS definition that more faithfully implements the Act, draws clearer jurisdictional lines, and preserves states’ authority over local land and water use.

Unlike the 2015 rule, the new proposal recognizes that waters which do not fall under the WOTUS definition are nevertheless protected by robust state and local laws, as well as numerous other federal statutes such as the Safe Drinking Water Act. The new proposal also adheres to key principles articulated by the Supreme Court regarding the limits of the CWA's reach while exerting federal jurisdiction over features with the strongest influence on major downstream waterbodies.

The agencies' new proposal therefore strikes a necessary balance between environmental protection and regulatory certainty, and will give the public long overdue clean water and clear rules.

Farm Bureau's WOTUS objectives for the Trump administration are:

- Ensure WOTUS remains a top regulatory reform priority;
- Ensure the administration devotes resources to WOTUS reform activities;
- Ensure prompt action to repeal the current rule;
- Ensure prompt action to propose a replacement WOTUS rule;
- Ensure the new administration has sufficient input from farmers and ranchers; and
- Use congressional interest to support Farm Bureau's repeal and replace objectives.

AFBF Policy:

Farm Bureau has significant concerns with the 2015 WOTUS rule and believes it expands federal jurisdiction, resulting in the imposition of burdensome requirements on agricultural producers.

Farm Bureau supports administrative efforts to repeal and replace the WOTUS rule.

Farm Bureau supports a rule that conforms to the limits approved by Congress and affirmed by the U.S. Supreme Court.

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